

to define small businesses as those entities with less than \$6 million in average annual gross revenues for the preceding three years.⁵²¹ We sought comment on whether different definitions of small business should be used for nationwide, Regional and EA licenses. We also sought comment regarding the treatment of gross revenues of affiliates and certain investors as it may affect the calculation of a small business's gross revenues and income.⁵²²

(2) Comments

290. AMTA and the SMR Advisory Group support our proposed two-tiered eligibility criteria for small businesses.⁵²³ Metricom contends that because of the high costs associated with the build-out and operation of a Regional or nationwide system, the Commission should define small business for the Phase II 220 MHz nationwide and Regional licenses as an entity with \$25 million or less in average gross revenues for the preceding three years, rather than \$15 million or less.⁵²⁴ Metricom also asserts that the Commission should modify its proposed attribution rules for small businesses so that small, publicly traded companies with widely dispersed voting power would not be ineligible.⁵²⁵ Comtech believes that for purposes of determining whether an entity qualifies as a small business, revenues and assets of investors holding more than 25 percent of an applicant's voting stock and revenues and assets of all affiliates should be attributable to the applicant.⁵²⁶

(3) Decision

291. While the nationwide and Regional Phase II 220 MHz licenses will have higher build-out and operational costs than will the EA licenses, we believe, based upon our prior auction experience -- particularly in the 900 MHz SMR auction -- that it is likely that bidders will attempt to aggregate licenses across regions or EAs to establish their markets. Thus, for example, bidders may elect to aggregate EAs to create a regional market, rather than bid for the Regional license itself. In order to ensure the meaningful participation of small business entities in the auction, therefore, we have decided to adopt a two-tiered definition of small business with thresholds applicable across all three categories of license. This approach will give qualifying small businesses flexibility to bid for a Regional license or, on the other hand, elect to bid for several EAs, without having to choose which type of license to bid for prior to the start of the auction. For purposes of bidding on the nationwide, Regional, and EA licenses, therefore, we will define: (1) a very small business as an entity that, together with

⁵²¹ *Id.*

⁵²² *Id.* at 272 (para. 173).

⁵²³ AMTA Comments at 22; SMR Comments at 20.

⁵²⁴ Metricom Comments at 13-14.

⁵²⁵ *Id.* at 11.

⁵²⁶ Comtech Comments at 18.

its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the three preceding years; and (2) a small business as an entity that, together with affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the three preceding years. Bidding credits will be determined, as discussed *infra*, based upon this two-tiered approach.

292. We disagree with Metricom that we should increase the gross revenues threshold amount to \$25 million, because, based upon our experience in the 900 MHz SMR auction, such an increase would be far too inclusive. In the 900 MHz SMR auction, we established small business definitions of \$15 million and \$3 million. Of the 128 applicants to participate in the auction, 101 qualified for the small business bidding credits. We believe the cost of building out a 220 MHz system most closely resembles the cost of a 900 MHz SMR system, that our experience in conducting the 900 MHz SMR auction indicates that our definitions of eligible small businesses were appropriate, and that it would substantially dilute the value of the small business preferences to increase the size of small businesses eligible for special bidding provisions. Therefore, we decline to adopt the Metricom proposal. We also conclude that, because the build-out costs of 220 MHz systems are similar to the build-out costs of 900 MHz SMR systems, it is appropriate to establish a definition of "very small business" for the 220 MHz service that is consistent with the definition we adopted for the 900 MHz SMR service. We therefore decline to adopt a definition based on the \$6 million we originally proposed to use for entities bidding on EA licenses.

293. For purposes of our Phase II 220 MHz small business definition, we will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant. Specifically, for purposes of determining small business status, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. This is a much simpler approach than we utilized in broadband PCS since it does not require a "control group."⁵²⁷ We believe this simpler approach is appropriate because we do not anticipate that 220 MHz licensees will have the same sort of capital requirements as broadband PCS licensees. We also choose not to impose specific equity requirements on the controlling principals of entities that meet our small business definition. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant, including both *de facto* and *de jure* control. For this purpose, we will borrow

⁵²⁷ A control group is defined as an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee, such that (1) the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation; (2) the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation; (3) in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and (4) the entity and/or its members have the right to receive dividends, profits, and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee. Section 24.720(j) of the Commission's Rules, 47 C.F.R. § 24.720(j).

from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.⁵²⁸ Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions.⁵²⁹ Moreover, we caution that while we are not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

294. As we did in broadband PCS, we will permit eligible small businesses to form consortia and not aggregate their gross revenues.⁵³⁰ Additionally, a small corporation that has dispersed voting stock ownership and no controlling affiliates will not be required to aggregate with its own revenues the revenues of each shareholder for purposes of small business status.⁵³¹ Thus, we clarify that such an applicant may qualify -- even in the absence of identifiable control being held by particular investors.

295. We note also that applicants and licensees claiming eligibility as a small business or consortium of small businesses are subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors. Consent to such audit is part of the certification included in the short-form application (FCC Form 175). Such consent includes consent to the audit of the applicant's or licensee's books, documents, and other material, including accounting procedures and practices, regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are and remain accurate. Such consent also includes inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business or keeping records regarding licensed Phase II 220 MHz service, and will also include consent to the interview of principals, employees, customers, and suppliers of the applicant or licensee.

⁵²⁸ See 13 C.F.R. § 121.401.

⁵²⁹ See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 447 (para. 80).

⁵³⁰ See Section 24.720(b) of the Commission's Rules, 47 C.F.R. § 24.720(b).

⁵³¹ See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 444-45 (para. 74); Section 24.720(m) of the Commission's Rules, 47 C.F.R. § 24.720(m) (defining "publicly traded corporation with widely dispersed voting power").

e. Bidding Credits

(1) Proposal

296. In the *Third Notice*, we proposed an approach that would be a hybrid of the bidding credit options offered to small businesses in the 900 MHz SMR auction and the nationwide narrowband PCS auction.⁵³² In order to ensure that small businesses have a realistic opportunity to acquire Phase II 220 MHz nationwide and Regional licenses, we proposed a 40 percent bidding credit for all qualified designated entities. For Phase II 220 MHz nationwide licenses, we proposed, *inter alia*, to offer this bidding credit on only one of the available channel blocks. For Phase II 220 MHz Regional licenses, we proposed to offer the bidding credit on all available channel blocks. Because we believed that the Phase II 220 MHz EA licenses are similar to the licenses offered in the 900 MHz SMR service, we proposed offering the same 10 percent bidding credit to qualified small businesses in the Phase II 220 MHz EA auction as we did in the 900 MHz SMR auction.⁵³³

(2) Comments

297. The SMR Advisory Group supports our proposed bidding credits.⁵³⁴ Comtech supports our proposal to provide a 40 percent bidding credit on all Phase II 220 MHz Regional license blocks, but asserts that the 40 percent bidding credit should also be available for all nationwide blocks.⁵³⁵

(3) Decision

298. We believe that small businesses are in the best position to decide which blocks of licenses to bid on. As we stated *supra*, based upon our experience in previous auctions, it is very likely that bidders will attempt to aggregate Regional and EA licenses in the development of their bidding strategies, particularly if these licenses are auctioned together. Thus, we will establish bidding credits consistent with our two-tiered definition of small business that will apply to all three license groups. For very small businesses that, together with affiliates and controlling principals, have average gross revenues that are not more than \$3 million for the three preceding years, we will give a 25 percent bidding credit, applicable for all three categories of licenses. Likewise, we will give small businesses that, together with affiliates and controlling principals, have average gross revenues that are not more than \$15 million for the three preceding years, a bidding credit of ten percent, available for all three categories of Phase II 220 MHz licenses. While the 25 percent bidding credit is less

⁵³² *Third Notice*, 11 FCC Rcd at 268-69 (para. 162).

⁵³³ *Id.* at 268-69 (paras. 161-165).

⁵³⁴ SMR at 21. See also AMTA Comments at 22 (supporting bidding credits for regional and EA licenses); U.S. MobilComm Comments at 6; Roamer Comments at 1-2; Incom Comments at 2.

⁵³⁵ Comtech Comments at 17.

than originally proposed for the nationwide and Regional licenses, we believe it is appropriate since we are now going to offer bidding credits generally for all channel blocks. We have also had favorable results in previous auctions with bidding credits at this level or lower.⁵³⁶

f. Installment Payments, Upfront Payments, and Down Payments

(1) Proposal

299. In the *Third Notice*, we proposed the use of installment payments and reduced down payments for all small businesses bidding for any of the Phase II 220 MHz nationwide, Regional and EA licenses.⁵³⁷ We also tentatively concluded that reduced upfront payments for small businesses would be unnecessary.⁵³⁸

(2) Comments

300. The SMR Advisory Group supports the use of installment payments and a reduced down payment to assist small businesses in participating in the Phase II 220 MHz auctions.⁵³⁹

(3) Decision

301. We will make installment payment plans available to small businesses that are winners in the 220 MHz auction. We recognize that small businesses, including those owned by women and minorities, face difficulties not encountered by other firms.⁵⁴⁰ As we have also noted previously, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses.⁵⁴¹ Licensees who qualify as small businesses or very small businesses in 220 MHz auctions will be entitled to pay their winning bid amount in quarterly installments over the term of the license with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. The rate for ten-year U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury

⁵³⁶ See, e.g., *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136, 161 (para. 47) (1995) (25 percent for broadband PCS); *Competitive Bidding Seventh Report and Order*, 11 FCC Rcd at 268-69 (paras. 161-65) (15 and 10 percent for 900 MHz SMR).

⁵³⁷ *Third Notice*, 11 FCC Rcd at 270-71 (paras. 166-169).

⁵³⁸ *Id.* at 275 (para. 180).

⁵³⁹ SMR Comments at 20.

⁵⁴⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389 (para. 230).

⁵⁴¹ *Id.* at 2389 (paras. 231-232).

Department before licenses are conditionally granted. These licensees will be able to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license.

302. We decline to adopt a second installment payment plan with a longer interest-only period for very small businesses with average gross revenues of not more than \$3 million. We believe that the two-year interest-only period in the single plan we adopt here provides all small businesses with the appropriate level of financing to overcome difficulties in attracting capital.⁵⁴² Given that we are making additional financial assistance available to very small businesses in the form of a 25 percent bidding credit, we do not think a longer interest-only period is justified.

303. We also conclude that we should provide for late payment fees in connection with our installment payment plan for Phase II 220 MHz licensees. We stated in the *Third Notice* that timely payment of all installments would be a condition of the award of a license.⁵⁴³ Therefore, when licensees are more than fifteen days late in their scheduled installment payments, we will charge a late payment fee equal to five percent of the amount of the past due payment. For example, if a \$50,000 payment is due on June 1, then on June 16, \$2,500 is due in addition to the payment. As we explained in adopting a late payment fee provision for broadband PCS F block auction winners, without such a fee licensees may not have adequate financial incentives to make installment payments on time and may attempt to maximize their cash flow at the government's expense by paying late. We note, too, that enhancing the fiscal accountability of entities receiving installment payment benefits is consistent with the purpose of the recently enacted Debt Collection Improvement Act of 1996. The five percent payment we adopt here is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, and principal payments.

304. Our upfront payment rules are intended to deter speculation and ensure participation by sincere bidders only. We believe that substantial upfront payments are necessary for both large and small businesses to achieve these goals, and that it would be inappropriate to adopt reduced upfront payment provisions for small businesses participating in the Phase II 220 MHz service auction. We therefore decline to do so.

305. We also believe that small businesses should be required to pay a down payment of 20 percent, as we have required in our broadband PCS D, E, and F block auction. We believe that such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems and will provide us with stronger assurance against defaults than a ten percent down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. We also

⁵⁴² See *D, E and F Block Report and Order*, 11 FCC Rcd at 7845 (para. 44).

⁵⁴³ *Third Notice*, 11 FCC Rcd at 271 (para. 168).

believe that a 20 percent down payment should cover the required payments in the unlikely event of default. Thus, small businesses will be required to bring their deposit up to ten percent of their winning bid within ten business days of the close of the auction. Prior to licensing, they will be required to pay an additional ten percent. Specific procedures for payment will be provided in a Public Notice.

g. Partitioning

(1) Proposal

306. As noted above, Congress directed the Commission to ensure that rural telephone companies have the opportunity to participate in spectrum-based services.⁵⁴⁴ In the *Third Notice*, we proposed a partitioning scheme for rural telephone companies similar to the one adopted for broadband PCS.⁵⁴⁵ We also proposed that rural telephone companies be defined, as in the *Competitive Bidding Fifth Report and Order*, as local exchange carriers having 100,000 or fewer access lines, including all affiliates.⁵⁴⁶ In addition, we sought comment on whether the Phase II 220 MHz service would benefit from the broader availability of geographic partitioning and channel disaggregation.⁵⁴⁷

(2) Comments

307. No commenters addressed these issues.

(3) Decision

308. Upon further analysis of the partitioning issues raised in the *Third Notice*, we have concluded that we will permit any holder of an EA, Regional or nationwide Phase II 220 MHz license to partition portions of its authorization and enter into contracts with eligible parties, allowing such parties to file long-form applications for the usable channels within the partitioned area.⁵⁴⁸ In a Fifth Notice of Proposed Rulemaking, we will propose rules implementing the partitioning decision we adopt in this Order.

⁵⁴⁴ See 47 U.S.C. § 309(j)(4)(D).

⁵⁴⁵ *Third Notice*, 11 FCC Rcd at 273-74 (para. 176) (citing *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5597-99 (para. 151)).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 274 (para. 177).

⁵⁴⁸ We have previously adopted expanded partitioning rights for broadband PCS. Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, GN Docket No. 96-113, Report and Order, FCC 96-474 (released Dec. 20, 1996) (*Partitioning Report and Order*).

309. We have decided to take this action with respect to partitioning because of our conclusion that allowing holders of EA, Regional and nationwide Phase II 220 MHz licenses to partition their geographic service areas will facilitate the provision of services in small markets and rural areas. Partitioning will also furnish providers of Phase II 220 MHz service with operational flexibility that will serve to promote the most efficient use of the spectrum and encourage participation by a wide variety of service providers.

310. However, we will not, at this time, authorize spectrum disaggregation for the Phase II 220 MHz service. Instead, we will seek information regarding the technical feasibility and appropriateness of spectrum disaggregation for the Phase II 220 MHz service in the Fifth Notice of Proposed Rulemaking. We note, however, that a disaggregation mechanism could prove to be a useful vehicle for introducing a greater degree of flexibility with respect to the utilization of non-contiguous channels by Phase II 220 MHz licensees.

311. Providers of 220 MHz service will be permitted to acquire partitioned licenses in either of two ways: (1) by forming bidding consortia to participate in auctions, and then partitioning the licenses won among consortium members; and (2) by acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. With regard to partitioning by small businesses, we seek comment in the Fifth Notice of Proposed Rulemaking regarding the treatment of bidding credits and installment payments. We also seek comment on other issues related to partitioning and disaggregation, such as whether to permit partitioning based on any license area defined by the parties.⁵⁴⁹ In the event we receive applications requesting Commission consent to partitioning transfers prior to the adoption of rules based on the Fifth Notice of Proposed Rulemaking, action on such applications will be deferred.

h. Transfer Restrictions and Unjust Enrichment Provisions

(1) Proposal

312. The Commission's unjust enrichment provisions are integral to the success of the special provisions for designated entities in the various auctionable services. In the *Competitive Bidding Second Report and Order*, we adopted unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.⁵⁵⁰

⁵⁴⁹ See, for example, the discussion at para. 325, *infra*.

⁵⁵⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394 (para. 259); Section 1.2111 of the Commission's Rules, 47 C.F.R. § 1.2111.

313. In the *Third Notice*, we sought comment regarding the appropriate approach to preventing unjust enrichment in the Phase II 220 MHz service. We asked whether a holding period of three years after the license grant -- in which a licensee would be prohibited from voluntarily transferring or assigning its license to any other entity -- should be imposed on small businesses in the Phase II 220 MHz service. We also asked whether, in the alternative, we should allow small businesses to transfer or assign their licenses without restriction but require the reimbursement of bidding credits and payment of all principal due upon transfer to an ineligible entity.⁵⁵¹

(2) Comments

314. No commenters addressed this issue.

(3) Decision

315. To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we will adopt unjust enrichment provisions similar to those adopted for narrowband PCS and the 900 MHz SMR service. Licensees seeking to transfer their licenses to entities which do not qualify as small businesses (or very small businesses seeking to transfer their licenses to small businesses or large companies), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Thus, for example, a small business that received a bidding credit seeking to transfer or assign a license to an entity that does not qualify as a small business will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. Similarly, a very small business that received a bidding credit seeking to transfer or assign a license to a small business that qualified for a lesser bidding credit will be required to reimburse the government for the difference between the amount of its bidding credit and the lesser credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. The amount of this payment will be reduced over time as follows: (1) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or, in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible); (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent, and (4) in year five the payment will be 25 percent, after which there will be no required payment. These assessments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.

316. In addition, if a licensee that qualifies for installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet the small business or very small business definition, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license

⁵⁵¹ *Third Notice*, 11 FCC Rcd at 275 (para. 179).

assignment or transfer. Also, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, this unjust enrichment provision will apply. We will apply these payment requirements for the entire license term to ensure that small businesses will look first to other small businesses when deciding to transfer their licenses. However, we will not impose a holding period or other transfer restrictions on these licensees.

i. *Spectrum Set-Asides*

(1) Proposal

317. In the *Third Notice* we expressed our concern, based on our experience with PCS, that designated entities may have difficulty competing for Phase II 220 MHz licenses against large firms with significant financial resources. We tentatively concluded, however, that the relatively large number of licenses available and the relatively small spectrum allocations in the 220 MHz service should allow for extensive small business participation without the use of spectrum set-asides. In addition, we expressed our belief that the effectiveness of bidding credits, reduced down payments, and installment payments would not be diluted as in broadband PCS due to the smaller capital outlay anticipated for the 220 MHz service.⁵⁵²

(2) Comments

318. No commenters addressed this issue.

(3) Decision

319. Because there will be both a large number and a large variety of licenses available in the Phase II 220 MHz auction, we will not adopt an entrepreneurs' block for the service. We conclude that small businesses will have a significant opportunity to compete for Phase II 220 MHz licenses, particularly given the special provisions that we have adopted for small businesses.

⁵⁵² *Id.* at 275 (para. 181).

FIFTH NOTICE OF PROPOSED RULEMAKING**V. INTRODUCTION**

320. In the Order we are adopting today we have concluded that we will permit any holder of a Phase II EA, Regional, or nationwide 220 MHz license⁵⁵³ to partition portions of its authorization.⁵⁵⁴ In the recent *Partitioning Report and Order* we expanded our rules to permit geographic partitioning and disaggregation for broadband PCS licensees, and we sought comment on geographic partitioning and spectrum disaggregation for cellular and General Wireless Communications Service (GWCS).⁵⁵⁵ We have previously examined partitioning and disaggregation issues for other services on a service-by-service basis and we presently permit, or are seeking comment on, geographic partitioning and spectrum disaggregation for several services, e.g., Multipoint Distribution Service (MDS),⁵⁵⁶ GWCS,⁵⁵⁷

⁵⁵³ We refer to such licensees in this Fifth Notice as "covered Phase II licensees." Phase II licensees that are not included in this definition are those Phase II licensees that are authorized to use Public Safety or EMRS channels.

⁵⁵⁴ See para. 308, *supra*.

⁵⁵⁵ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, GN Docket No. 96-113, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-474, paras. 93-113 (released Dec. 20, 1996) (*Partitioning Report and Order*).

⁵⁵⁶ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Report and Order, 10 FCC Rcd 9589, 9614-15 (paras. 46-47) (1995) (*MDS Report and Order*). Additionally, we impose unjust enrichment provisions for partitioning by small businesses to other businesses. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Memorandum and Order on Reconsideration, 10 FCC Rcd 13821, 13833 (paras. 69-70) (1995).

⁵⁵⁷ Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624, 665 (para. 105) (1995) (*GWCS Second Report and Order*), *recon. pending* (permitting rural telephone company partitioning).

800 MHz Specialized Mobile Radio (SMR),⁵⁵⁸ paging,⁵⁵⁹ 38 GHz fixed point-to-point microwave,⁵⁶⁰ 900 MHz SMR,⁵⁶¹ and the Wireless Communications Service (WCS).⁵⁶²

321. We believe that it is appropriate at this time to consider whether to permit full partitioning and disaggregation in the 220 MHz service. As we indicated in the *Partitioning Report and Order*, we found partitioning and disaggregation to be an effective means of providing broadband PCS licensees with the flexibility they need to tailor their service offerings to meet market demands.⁵⁶³ In addition, the *Partitioning Report and Order* concluded that partitioning and disaggregation may be used to overcome entry barriers

⁵⁵⁸ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463, 1576, 1578, 1580 (paras. 253, 257, 264) (1995) (*800 MHz Second FNPRM*) (requesting comment on partitioning and disaggregation).

⁵⁵⁹ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-59, paras. 192-94 (released February 24, 1997) (*Paging Report and Order*) (permitting all geographic area paging licensees to partition to any party eligible to be a paging licensee).

⁵⁶⁰ Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands, ET Docket No. 95-183, Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930, 4942-43, 4972-73, (paras. 24, 89-90) (1995) (*38 GHz NPRM*) (proposing partitioning for rural telephone companies, and seeking comment on whether partitioning and disaggregation should be available to all licensees in the 37 GHz band).

⁵⁶¹ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2711-12 (paras. 177-179) (1995) (*900 MHz Second Reconsideration Order*) (adopting rural telephone company partitioning). On September 20, 1996, American Mobile Telecommunications Association, Inc., filed a Petition for Rulemaking requesting the Commission to expand its rules to permit partitioning to include all 900 MHz SMR licenses and to permit spectrum disaggregation. See American Mobile Telecommunications Association, Inc., Files Petition for Rulemaking to Expand Geographic Partitioning and Spectrum Disaggregation Provisions for 900 MHz SMR, Public Notice, DA 96-1654 (released Oct. 4, 1996). That Petition for Rulemaking was incorporated into the 800 MHz rulemaking proceeding, PR Docket No. 94-144, where similar partitioning and disaggregation issues are being considered. *Id.*

⁵⁶² *Wireless Communications Service Report and Order*, (paras. 96-103) (adopting partitioning and disaggregation for all licensees in the Wireless Communications Service).

⁵⁶³ *Partitioning Report and Order* at para. 2.

through the creation of smaller licenses that require less capital, thereby facilitating greater participation by small businesses, rural telephone companies, and minority- and female-owned businesses.⁵⁶⁴ Therefore, we seek comment on whether these benefits similarly justify extension of partitioning rules to Phase I nationwide licensees, and establishment of disaggregation rules for the 220 MHz service.

VI. DISCUSSION

A. PARTITIONING AND DISAGGREGATION FOR 220 MHZ SERVICE

322. In the Order we adopt today, we have decided to allow partitioning of covered 220 MHz Phase II licenses.⁵⁶⁵ In this Fifth Notice of Proposed Rulemaking we will seek comment as to how various requirements imposed on covered Phase II licensees (*e.g.*, construction requirements) may be modified if such licensees partition their authorization. We seek comment as to whether partitioning of 220 MHz Phase I nationwide licenses should be permitted in a manner similar to the rules for partitioning we have adopted for broadband PCS licensees. We tentatively conclude that we should not adopt partitioning for those Phase II licensees that are not covered Phase II licensees and non-nationwide Phase I licensees because such licenses are awarded on a site specific basis rather than for a geographic area. In addition, we seek comment as to whether all Phase I and Phase II 220 MHz licensees should be permitted to disaggregate their licensed spectrum. Since the 220 MHz service includes non-commercial uses, *e.g.*, use of spectrum for internal communication, by Public Safety and EMRS entities, we seek comment as to whether additional rules for partitioning and disaggregation should be adopted to address the use of the 220 MHz service for possible commercial and non-commercial services.

323. In the following paragraphs we seek comment on specific aspects of partitioning and disaggregation, which we will need to address if we decide to adopt partitioning for Phase I nationwide licensees and disaggregation for all 220 MHz licensees. For example, Phase I nationwide licensees are not currently permitted to assign or transfer a license before the licensee has constructed at least 40 percent of the proposed system.⁵⁶⁶ We therefore seek comment as to whether a Phase I nationwide licensee should be permitted to partition or disaggregate prior to constructing at least 40 percent of its proposed system. We also seek comment as to whether there are technical or regulatory constraints unique to the 220 MHz service, such as, for example, the construction requirements for Phase I nationwide licensees, that would render partitioning or disaggregation impractical or administratively burdensome. Further, we recognize that there are special competitive bidding issues, similar to those raised in the broadband PCS context, that must be resolved if we permit partitioning and disaggregation for the 220 MHz service. We shall address those issues separately in paragraphs 343 and 344, *infra*.

⁵⁶⁴ *Id.*

⁵⁶⁵ See para. 308, *supra*.

⁵⁶⁶ Section 90.709 of the Commission's Rules, 47 C.F.R. § 90.709.

B. AVAILABLE LICENSE AREA

324. In the *Partitioning Report and Order*, we found that allowing partitioning of broadband PCS licenses along any service area defined by the parties is the most logical approach.⁵⁶⁷ We concluded that allowing the parties to define the partitioned PCS service area would allow licensees to design flexible and efficient partitioning agreements which would permit marketplace forces to determine the most suitable service areas. We also found that requiring PCS partitioning along county lines was too restrictive and might discourage partitioning.⁵⁶⁸

325. Covered Phase II 220 MHz service areas are based on either Economic Areas or Regional Areas.⁵⁶⁹ In addition, there are Phase I and Phase II nationwide licenses in the 220 MHz service. We tentatively conclude that a flexible approach to partitioned areas, similar to the one we adopted for broadband PCS, is appropriate for the 220 MHz service. We therefore propose to permit partitioning of Phase I nationwide and covered Phase II 220 MHz licenses based on any license area defined by the parties. We seek comment on this proposal, and in particular on whether this proposal is consistent with our licensing of the 220 MHz service, and whether there are any technical or other issues unique to the 220 MHz service that might impede the adoption of a flexible approach to defining the partitioned license area.

C. MINIMUM OR MAXIMUM DISAGGREGATION STANDARDS

326. We seek comment as to whether, if we permit disaggregation in the 220 MHz service, minimum disaggregation standards are necessary. We seek to determine whether, given the unique characteristics of the 220 MHz service, technological and administrative considerations warrant the adoption of such standards. Licensees in this service may be authorized to use as few as one relatively narrow 5 kHz channel pair to as many as 15 channel pairs (*i.e.*, in a Phase II Regional authorization). We seek comment as to whether we should adopt standards which would be flexible enough to encourage disaggregation while providing a standard which is consistent with our technical rules and by which we would be able to track disaggregated spectrum and review disaggregation proposals in an expeditious fashion.

D. COMBINED PARTITIONING AND DISAGGREGATION

327. We seek comment regarding whether combined partitioning and disaggregation should be permitted for the 220 MHz service. By "combined" partitioning and disaggregation we refer to circumstances in which a licensee would be authorized, for example, to obtain a license for a portion of a Region with only two channels. As another example, the licensee could obtain a license consisting of a partitioned portion of one or more

⁵⁶⁷ *Partitioning Report and Order* at para. 24.

⁵⁶⁸ *Partitioning Report and Order* at paras. 23-24.

⁵⁶⁹ See para. 80, *supra*.

other licenses held by other 220 MHz service providers *and* a disaggregated portion of one or more other licenses held by other 220 MHz service providers. We tentatively conclude that we should permit such combinations in order to provide parties the flexibility they need to respond to market forces and demands for service relevant to their particular locations and service offerings.

E. CONSTRUCTION REQUIREMENTS

328. In the Order we have adopted today we require that covered Phase II licensees implementing nationwide land mobile or paging systems must construct base stations that provide coverage to a composite area of at least 750,000 square kilometers or serve at least 37.5 percent of the population of the United States within five years of initial license grant, and that provide coverage to at least 1,500,000 square kilometers or at least 75 percent of the population within 10 years of the grant.⁵⁷⁰ We have permitted covered Phase II licensees implementing fixed operations as part of their nationwide system to meet five- and 10-year "substantial service" requirements as an alternative to meeting the above-mentioned construction requirements.⁵⁷¹

329. We also have required EA and Regional licensees implementing land mobile or paging systems to construct base stations to provide coverage to at least one-third of the population of their EA or Region within five years of initial authorization and at least two-thirds of the population of their EA or Region within 10 years of initial authorization.⁵⁷² EA and Regional licensees that are offering fixed services as part of their EA and Regional system and those licensees who, because of the existence of one or more incumbent co-channel licensees in their EA or Region, can only provide service to populations outside of the areas served by these incumbents, have the option of providing a showing of substantial service.⁵⁷³

330. In the *Partitioning Report and Order*, we adopted two construction options for partitioning for broadband PCS that give the parties the flexibility to choose how to apportion the responsibility to build out the partitioned license area, while also ensuring that the spectrum is used to the same degree that would have been required had the partitioning transaction not taken place.⁵⁷⁴ Under the first option, the partitionee certifies that it will

⁵⁷⁰ See para. 158, *supra*.

⁵⁷¹ *Id.*

⁵⁷² See para. 163, *supra*.

⁵⁷³ *Id.*

⁵⁷⁴ See *Partitioning Report and Order* at paras. 42-43. These objectives are the same in the case of the disaggregation rules adopted in the *Partitioning Report and Order*. See *id.* at para. 62.

satisfy the same construction requirements as the original licensee.⁵⁷⁵ The partitionee then must meet the prescribed service requirements in its partitioned area while the partitioner is responsible for meeting those requirements in the area it has retained.⁵⁷⁶

331. Under the second option, the original licensee certifies that it has already met or will meet its five-year construction requirement and that it will meet the 10-year construction requirement for the entire market involved.⁵⁷⁷ Because the original licensee retains the responsibility for meeting the construction requirements for the entire market, the partitionee is permitted to comply with a less rigorous construction requirement⁵⁷⁸ -- the partitionee must only meet a substantial service requirement for its partitioned license area at the end of the 10-year license term.⁵⁷⁹

332. In addition, we required that, at the five-year benchmark, broadband PCS partitionees must file supporting documentation showing compliance with the construction requirements.⁵⁸⁰ The *Partitioning Report and Order* further provides that licensees failing to meet the service requirements will be subject to forfeiture, license cancellation, or other penalties.⁵⁸¹

333. We seek comment as to whether we should adopt rules for covered Phase II licensees to establish dual construction options and attendant requirements for 220 MHz service partitioners and partitionees, similar to those we have adopted for broadband PCS. Since our Rules do not currently provide for a lesser construction requirement, we particularly seek comment as to the appropriateness of the lesser construction requirement for the second option.

334. With respect to disaggregation, the *Partitioning Report and Order* has established a flexible approach similar to the rules adopted for partitioning.⁵⁸² This approach retains the underlying five- and 10-year construction requirements for the spectrum block as a

⁵⁷⁵ *Id.* at para. 42..

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at para. 43.

⁵⁸¹ *Id.*

⁵⁸² *Id.* at para. 62.

whole, but then allows either party to the disaggregation agreement to meet the construction requirements with respect to its disaggregated portion of the license.⁵⁸³ Thus:⁵⁸⁴

[A] . . . licensee who disaggregates a portion of its spectrum may elect to retain responsibility for meeting the five and ten-year coverage requirements, or it may negotiate a transfer of this obligation to the disaggregatee. In either case, the rules ensure that the spectrum will be developed to at least the same degree that was required prior to disaggregation.

The rules we adopted in the *Partitioning Report and Order* also provide that parties seeking Commission approval of a disaggregation agreement must certify with respect to which party will assume responsibility for complying with the applicable five- and 10-year construction requirements.⁵⁸⁵ Parties may also propose to share the responsibility for meeting these requirements.⁵⁸⁶ As part of the Commission's public interest review under Section 310(d), the Commission will review each transaction to ensure that the party designated as responsible for meeting the construction requirements is a *bona fide* licensee and has the requisite ability and resources to meet the applicable requirements. If only one party agrees to take responsibility for meeting the construction requirement and later fails to comply with the requirement, then that party's license will be subject to forfeiture.⁵⁸⁷ The license of the other party to the agreement, however, will not be affected by such a failure to comply.⁵⁸⁸ If both parties agree to share the responsibility for meeting the construction requirements and either party later fails to do so, then both parties' licenses will be subject to forfeiture.⁵⁸⁹

335. We seek comment as to whether we should adopt rules for covered Phase II licensees similar to those disaggregation rules we have adopted for broadband PCS. Under such a certification approach, the disaggregating parties would be required to submit a certification, signed by both the disaggregator and disaggregatee, stating whether one or both of the parties will retain responsibility for meeting the five- and 10-year construction requirements for the 220 MHz market involved. If one party takes responsibility for meeting the construction requirements, then that party would be subject to license forfeiture for failing to meet the construction requirements, but such a failure would not affect the status of the other party's license. If both parties agree to share the responsibility for meeting the

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.* at para. 63.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

construction requirements, then both parties' licenses would be subject to forfeiture if either party fails to meet the construction requirements.

336. We are proposing rules for licensees other than covered Phase II licensees that differ from the approach we have taken in the *Partitioning Report and Order*. Phase I non-nationwide licensees and Phase II licensees authorized on Public Safety or EMRS channels are not authorized to operate within a particular geographic area, but instead are authorized to construct a single land mobile base station for base and mobile operations. Phase I non-nationwide licensees must construct their systems, having all specified base stations constructed with all channels, and place their systems in operation within eight months of the initial license grant.⁵⁹⁰

337. In the Order we adopted today we have concluded that Phase II licensees operating on Public Safety or EMRS channels must construct their authorized base station and place it in operation within 12 months of initial authorization.⁵⁹¹ Consistent with our decision in this Order that Phase I non-nationwide licensees will be permitted to begin primary fixed or paging operations only after meeting the requirement that they construct their land mobile base station and place it in operation or commence service,⁵⁹² we propose that Phase I non-nationwide licensees be permitted to disaggregate their licensed spectrum only after they have met the applicable construction deadline. We also propose that Phase II licensees operating on Public Safety or EMRS channels should be permitted to disaggregate their licensed spectrum only after they have met the applicable construction deadline. Since the construction deadline would therefore be met before any disaggregation is allowed, no construction requirement would be imposed on a disaggregatee. We seek comment on these proposals.

338. Phase I nationwide licensees are subject to a series of construction requirements set out in Section 90.725 of our Rules at two, four, six, and 10 years after the initial license grant.⁵⁹³ These construction requirements are based on the licensee constructing base stations in specific percentages of geographic areas that the licensee designated in its application, including base stations in a specific number of urban areas listed in Section 90.741 of the Commission's Rules.⁵⁹⁴ Unlike the broadband PCS rules, which do not dictate a minimum level of spectrum usage by the original PCS licensee,⁵⁹⁵ our construction rules for Phase I

⁵⁹⁰ Section 90.725(f) of the Commission's Rules, 47 C.F.R. § 90.725(f). The construction deadline was extended as outlined at para. 22 n.17, *supra*.

⁵⁹¹ See para. 166, *supra*.

⁵⁹² See para. 139, *supra*.

⁵⁹³ Section 90.725 of the Commission's Rules, 47 C.F.R. § 90.725.

⁵⁹⁴ Section 90.741 of the Commission's Rules, 47 C.F.R. § 90.741.

⁵⁹⁵ See *Partitioning Report and Order* at para. 62.

nationwide licensees require that the constructed base stations have a minimum of five nationwide channels. We tentatively conclude, therefore, that a disaggregatee obtaining spectrum from a Phase I nationwide licensee should be required to meet the same construction requirements as the original licensee. The disaggregatee would be required to meet the same two-, four-, six-, and 10-year requirements as the original licensee for the spectrum it obtains, while the original licensee would be responsible for meeting the requirements for the spectrum it retains. We seek comment on this tentative conclusion.

339. Since the construction requirements for Phase I nationwide licensees differ so markedly from those pertaining to Phase II nationwide licensees or licensees in other services such as broadband PCS or GWCS, it does not appear, as a practical matter, to be possible to have similar construction options for Phase I nationwide partitionees. For example, a Phase I partitionee may never be able to meet the requirement of Section 90.725(a)(2) that, within four years, it construct base stations in at least 28 of the 100 urban areas listed in Section 90.741, since a Phase I partitionee may not even have that many urban areas in its partitioned area. Thus, the first option adopted in the *Partitioning Report and Order*, under which the partitionee certifies that it will satisfy the same construction requirements as the original license, does not appear to be a viable mechanism in the case of Phase I nationwide licensees in the 220 MHz service.

340. Similarly, the original licensee may not have 28 urban areas remaining after it partitions its license. Thus, the second option adopted in the *Partitioning Report and Order*, under which the original licensee certifies that it has met or will meet all of the construction requirements, would likewise not be possible. Given the difficulties created by these construction requirements, we seek comment on whether partitioning of Phase I nationwide licenses should be permitted. If such partitioning is allowed, we seek comment on what construction requirements could be imposed on the original licensee and any partitionees. In light of the unique construction requirements imposed on Phase I nationwide licensees, we also seek comment on what type of construction requirements should be imposed on Phase I licensees and their partitionees and disaggregatees if a Phase I nationwide license is both partitioned and disaggregated.

F. LICENSE TERM

341. Phase I non-nationwide 220 MHz licenses are granted for five-year terms and Phase I nationwide 220 MHz licenses are granted for a period of 10 years.⁵⁹⁶ In the Order we have adopted today we established a 10-year license term for both nationwide⁵⁹⁷ and non-nationwide Phase II 220 MHz licenses.⁵⁹⁸ We further found that all Phase I and Phase II licensees seeking renewal of their authorizations must meet the requirements for license

⁵⁹⁶ See Section 90.149 of the Commission's Rules, 47 C.F.R. § 90.149. See also *CMRS Third Report and Order*, 9 FCC Rcd 8157 (para. 386) (modifying 47 C.F.R. § 90.149 (1994)).

⁵⁹⁷ See para. 54, *supra*.

⁵⁹⁸ See para. 133, *supra*.

renewal identical to those provided in Section 22.940 of our rules.⁵⁹⁹ Therefore, 220 MHz licensees that demonstrate that they have provided substantial service during their past license terms and have substantially complied with the Commission's rules, policies, and the Communications Act, will be granted a renewal expectancy.⁶⁰⁰

342. In the *Partitioning Report and Order*, we found that allowing parties acquiring a partitioned license or disaggregated spectrum to "re-start" the license term from the date of the grant of the partial assignment application could allow parties to circumvent our established license term and unnecessarily delay service.⁶⁰¹ We seek comment as to whether our 220 MHz rules should similarly provide that parties obtaining partitioned 220 MHz licenses or disaggregated spectrum hold their license for the remainder of the original licensee's five- or 10-year license term. In addition, we seek comment as to whether 220 MHz partitionees and disaggregatees should be afforded the same renewal expectancy as other 220 MHz licensees. We tentatively conclude that limiting the license term of the partitionee or disaggregatee is necessary to ensure that there is maximum incentive for parties to pursue available spectrum as quickly as practicable.

G. COMPETITIVE BIDDING ISSUES

343. Competitive bidding issues similar to those in broadband PCS arise in the context of 220 MHz service partitioning and disaggregation. Our competitive bidding rules for the covered Phase II 220 MHz service include provisions for installment payments and bidding credits for small businesses and very small businesses.⁶⁰² We also adopted rules to prevent unjust enrichment by such entities that seek to transfer licenses obtained through use of one of these special benefits.⁶⁰³ We tentatively conclude that the Phase II 220 MHz service partitionees and disaggregatees that would qualify as small businesses or very small businesses should be permitted to pay their pro rata share of the remaining government obligation through installment payments. We seek comment on this tentative conclusion. We further invite comment as to the exact mechanisms for apportioning the remaining government obligation between the parties and whether there are any unique circumstances that would make devising such a scheme for the Phase II 220 MHz service more difficult than for broadband PCS. Since Phase II 220 MHz service areas are allotted on a geographic basis, in a manner similar to broadband PCS, we propose using population as the objective measure to calculate the relative value of the partitioned area and amount of spectrum disaggregated as the objective measure for disaggregation, and we seek comment on this proposal.

⁵⁹⁹ Section 22.940 of the Commission's Rules, 47 C.F.R. § 22.940.

⁶⁰⁰ See Section 22.940(a) of the Commission's Rules, 47 C.F.R. § 22.940(a).

⁶⁰¹ *Partitioning Report and Order* at para. 77.

⁶⁰² See paras. 296-303, *supra*.

⁶⁰³ See paras. 312-316, *supra*.

344. We seek comment on whether to apply unjust enrichment rules to small or very small business Phase II 220 MHz licensees that partition or disaggregate to non-small businesses. Commenters should address how to calculate unjust enrichment payments for designated entity Phase II 220 MHz service licensees paying through installment payments and those that were awarded bidding credits that partition or disaggregate to non-small businesses. We ask that commenters also address how we should calculate unjust enrichment payments in situations where a very small business partitions or disaggregates to a small business that qualifies for a lower bidding credit. Commenters should address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area and amount of spectrum disaggregated as the objective measures. We propose using methods similar to those adopted for broadband PCS for calculating the amount of the unjust enrichment payments that must be paid in such circumstances, and we seek comment on this proposal.⁶⁰⁴

H. LICENSING ISSUES

345. Section 90.709(d) of our Rules currently forbids partial assignment of Phase I 220 MHz licenses.⁶⁰⁵ However, since there are existing partial assignment rules for commercial mobile radio stations in Part 90,⁶⁰⁶ we propose utilizing partial assignment procedures, similar to those adopted for broadband PCS, to review 220 MHz partitioning and disaggregation transactions. Partial assignment applications would be placed on public notice and subject to petitions to deny. The parties would be required to submit an FCC Form 490, an FCC Form 600 and, if necessary, an FCC Form 430, together as one package under cover of the FCC Form 490. We invite comment on whether any additional procedures are necessary for reviewing these applications. We also seek comment on how licensing issues should be addressed for non-commercial mobile radio stations in the 220 MHz service with respect to partial assignments.

VII. PROCEDURAL MATTERS

346. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.⁶⁰⁷

347. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules,⁶⁰⁸ interested parties may file comments on or before April 15, 1997, and

⁶⁰⁴ *Partitioning Report and Order* at paras. 34-35.

⁶⁰⁵ Section 90.709(d) of the Commission's Rules, 47 C.F.R. § 90.709(d).

⁶⁰⁶ See Section 90.153 of the Commission's Rules, 47 C.F.R. § 90.153.

⁶⁰⁷ See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

⁶⁰⁸ 47 C.F.R. §§ 1.415, 1.419.

reply comments on or before **April 30, 1997**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained in the Fifth Notice of Proposed Rulemaking or the Third Report and Order should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W. Washington, D.C. 20554, or via the Internet to dconway@fcc.gov. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

Initial and Final Paperwork Reduction Act of 1995 Analyses

348. This Third Report and Order and Fifth Notice of Proposed Rulemaking contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, the Commission invites the general public to take this opportunity to comment on the information collections contained in both the Third Report and Order and the Fifth Notice of Proposed Rulemaking as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and Agency comments on the information collections contained in the Fifth Notice of Proposed Rulemaking are due 60 days after publication of the summary of the Fifth Notice of Proposed Rulemaking in the Federal Register. Public comments on the information collections contained in the Third Report and Order are due 60 days after publication of the summary of the Third Report and Order in the Federal Register. These comments should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov. Comments on the information collections contained in both the Third Report and Order and the Fifth Notice of Proposed Rulemaking should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Initial and Final Regulatory Flexibility Act Analyses

349. As required by the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 5 U.S.C. § 601 et seq., the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact of the rule changes in this document on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix A. In

addition, as required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document is contained in Appendix F. Written public comments are requested on the Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice portion of this decision, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Third Report and Order and Fifth Notice of Proposed Rulemaking, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.⁶⁰⁹

VIII. ORDERING CLAUSES

350. Authority for issuance of this Third Report and Order is contained in Sections 4(i), 303(r), 309(j), and 332 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332.

351. Accordingly, IT IS ORDERED that Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in Appendix B, effective 140 days after publication of this Order in the Federal Register.

352. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Columbia Cellular Corporation, PLMRS Narrowband Corp. and 360 Mobile Data Joint Venture on August 6, 1993, ARE DISMISSED as moot.

353. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), the Chief, Wireless Telecommunications Bureau, IS GRANTED DELEGATED AUTHORITY to implement and modify auction procedures in the Phase II 220 MHz service, including the general design and timing of an auction; the number and grouping of authorizations to be offered in any particular auction; the manner of submitting bids; the amount of minimum opening bids and bid increments; activity and stopping rules; and application and payment requirements, including the amount of upfront payments; and to announce such procedures by Public Notice.

354. IT IS FURTHER ORDERED that all pending nationwide and non-nationwide 220 MHz applications, together with the appropriate filing fees, will be returned to applicants, without prejudice.

355. IT IS FURTHER ORDERED that a Public Notice will be issued announcing the acceptance of applications for authorizations on Channels 161-170 and Channels 181-185 after 140 days after publication of this Order in the Federal Register.

⁶⁰⁹ Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1980).

356. IT IS FURTHER ORDERED that applications for temporary, secondary authorizations for geophysical telemetry operations will be accepted beginning 140 days after publication of this Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "William F. Caton".

William F. Caton
Acting Secretary

APPENDIX A

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Notice of Proposed Rulemaking* in this proceeding (*Third Notice*).¹ The Commission sought written public comments on the proposals in the *Third Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *220 MHz Third Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).²

I. Need For and Objective of the Rules:

The rules adopted in this decision will establish a flexible regulatory scheme that will allow for efficient licensing and use of the 220 MHz service, eliminate unnecessary regulatory burdens on existing and future 220 MHz licensees, provide a wide variety of radio services to the public, enhance the competitive potential of 220 MHz services in the mobile marketplace, and continue to provide a home for the development of spectrally efficient technologies. By establishing competitive bidding procedures pursuant to § 309(j) of the Communications Act, this decision will promote economic opportunity and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. The adoption of competitive bidding rules will also permit the recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No issues were raised specifically in response to the IRFA. However, we have considered the significant economic impact on a substantial number of small entities through consideration of comments that pertained to issues of concern to small businesses. For example, two equipment manufacturers, SEA and Securicor, argued against allowing Phase I and Phase II licensees to aggregate their contiguous channels to create wider bandwidth

¹ *Third Notice*, 11 FCC Rcd at 287.

² Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. §§ 601 *et seq.*